Krishnamoorthi a/l Kathurayan v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–66 OF 2004(4)
AZAHAR MOHAMED JC
24 JANUARY 2005

Criminal Procedure — Habeas Corpus — Preventive detention — Applicant detained under s4(1) of the Emergency (Public Order & Prevention) Ordinance 1969 — Whether Minister addressed his mind to relevant limb of s 4(1) — Whether illegality or irregularity in earlier detention relevant in determining legality of detention order — Endorsement did not state date of swearing of affidavit — Whether fatal — Emergency (Public Order & Prevention) Ordinance 1969 ss 4(1), (4)

The applicant was the subject of a detention order made by the Deputy Minister of Internal Security pursuant to s 4(1) of the Emergency (Public Order and Prevention) Ordinance 1969 ('the Ordinance'). He filed this application for a writ of *habeas corpus* for his release from detention in Pusat Pemulihan Akhlak, Simpang Renggam, Johor. In support of the application, the applicant filed an affidavit enumerating numerous grounds for challenging the ministerial order of detention. The first one related to the complaint that he was not informed of the ground of his detention and the allegations of fact on which the detention order was based in contravention of s 4(4) of the Ordinance. The second was in connection with his first arrest on 9 April 2004. The applicant pointed out that the police arrested him under the Ordinance on 14 May 2004. Thus, the applicant raised the issue of the legality of his detention between 9 April 2004 and 14 May 2004. The third was directed against the affidavit filed by the respondents in opposing this *habeas corpus* application. It was argued that this affidavit was defective and inadmissible in evidence to answer the *habeas corpus* application, as the endorsement did not state the date of swearing of the affidavit. The fourth and the last point taken was that the first respondent failed to give full attention to the ground of detention and the allegations of fact and this was evident, itwas argued, by the fact that the ground and the allegations were signed by the 'Penolong Setiausaha Keselamatan Dalam Negeri' on 12 July 2004, the same date the first respondent signed the detention order.

Held, dismissing the application:

(1) The Deputy Minister in his affidavit said that having regards to the reports and the information relating to the conduct of the applicant and upon a proper evaluation of the facts and after due deliberation, he was satisfied that it was necessary for the suppression of violence and the prevention of crimes involving violence that the applicant should be detained for a period of two years. He has explained carefully the process

and the procedure of preparing the grounds and the allegation of facts on which the detention order was based before he finally signed the detention order on 12 July 2004. The decision by the deputy minister to issue the detention order was therefore made upon a proper evaluation of all the facts and after due deliberation. The detention order and the allegations of facts upon which the ground of detention was based was within the scope of s 4 of the Ordinance. It is an established law that a court does not interfere if the ministerial discretion is properly exercised (see para 22).

(2) The onus of proving the legality of the detention order whereby the applicant was ordered to be detained for a period of two years at the Pusat Permulihan Akhlak, Simpang Renggam, Johor was on the Deputy Minister in the first instance. He had discharged it by the production of the detention order. On the facts of the present case, the court was satisfied that the detention of the applicant had been made in the exercise of a valid legal power. Any illegality or irregularity in the earlier detention was quite irrelevant in determining the legality of the order made by the Deputy Minister (see para 11); *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 followed.

(3) In the affidavit, the respondents had clearly stated that a copy of the detention order and the allegations of fact had been served on the applicant. The contents of the documents had also been explained to the applicant. The affidavit also explained the procedure that was followed. The court having carefully considered the relevant passages of both the affidavits was therefore unable to agree with the arguments for the applicant on the third ground (see paras 18 and 19).

(4) Any irregularity or illegality in the initial arrest, custody and detention of the applicant by the police in this matter was not relevant for the purpose of determining the legality or the lawfulness of the detention order issued by the deputy minister on 12 July 2004. Such irregularity or illegality did not render the detention order invalid or ineffective. Any irregularity of the initial arrest and detention of the applicant by the police had been taken over by subsequent event with the issuance of the detention order by the Deputy Minister (see para 15): *Munisvaran Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2004] 3 CLJ 375 not followed.

[**Bahasa Malaysia summary**

Pemohon merupakan subjek satu perintah penahanan yang dibuat oleh Timbalan Menteri Keselamatan Dalam Negeri menurut s 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan tersebut'). Beliau telah memfailkan permohonan untuk satu writ *habeas corpus* untuk pelepasan beliau daripada tahanan di Pusat Pemulihan Akhlak, Simpang

Renggam, Johor. Bagi menyokong permohonan itu, pemohon telah memfailkan satu afidavit menyatakan alasan-alasan untuk mencabar perintah penahanan oleh kementerian. Yang pertama berkaitan dengan aduan bahawa beliau tidak dimaklumkan alasan beliau ditahan dan pengataan fakta yang mana perintah penahanan tersebut didasarkan adalah bertentangan dengan s 4(4) Ordinan tersebut. Keduanya berkaitan tangakapan pertama beliau pada 9 April 2004. Pemohon menekankan bahawa polis telah menangkap beliau di bawah Ordinan tersebut pada 14 Mei 2004. Oleh itu, pemohon menimbulkan persoalan kesahan penahanan beliau antara 9 April 2004 dan 14 Mei 2004. Ketiganya adalah berkaitan afidavit yang difailkan oleh responden-responden dalam membangkang permohonan *habeas corpus* ini. Adalah dipersetujui bahawa afidavit ini defektif dan tidak boleh diterima pakai sebagai keterangan untuk menjawab permohonan *habeas corpus*, kerana pengindorsan tidak menyatakan tarikh angkat sumpah affidavit itu. Keempatnya dan yang terakhir adalah bahawa responden pertama gagal untuk memberikan perhatian penuh kepada alasan penahanan dan pengataan fakta dan ini adalah jelas, seperti yang dihujahkan, melalui fakta bahawa alasan dan pengataan tersebut ditandatangani oleh Penolong Setiausaha Keselamatan Dalam Negeri pada 12 Julai 2004, tarikh yang sama responden pertama menandatangani perintah penahanan itu.

Diputuskan, menolak permohonan tersebut:

(1) Timbalan Menteri dalam afidavitnya menyatakan bahawa berdasarkan laporan-laporan dan maklumat berkaitan perlakuan pemohon dan dengan penilaian betul berhubung fakta dan setelah dipertimbangkan dengan sewajarnya, beliau berpuas hati bahawa adalah perlu untuk mengawal keganasan dan menghalang jenayah yang melibatkan keganasan bahawa pemohon patut ditahan untuk tempoh dua tahun. Beliau menjelaskan dengan terang proses dan prosedur menyediakan alasan-alasan dan pengataan-pengataan fakta yang mana menjadi asas perintah penahanan itu sebelum beliau menandatangani perintah penahanan itu pada 12 Julai 2004. Keputusan oleh Timbalan Menteri berhubung persoalan tentang perintah penahanan telah dibuat dengan penilaian yang betul dan setelah dipertimbangkan dengan sewajarnya. Perintah penahanan dan pengataan-pengataan fakta yang mana menjadi asas alasan penahanan adalah dalam skop s 4 Ordinan tersebut. Adalah undang-undang mantap bahawa mahkamah tidak campur tangan jika budi bicara kementerian digunakan sewajarnya (lihat perenggan 22).

(2) Beban membuktikan kesahan perintah penahanan yang mana pemohon diperintahkan untuk ditahan untuk tempoh dua tahun di Pusat Permulihan Akhlak, Simpang Renggam, Johor terletak atas Timbalan Menteri pada peringkat permulaan. Beliau telah melepaskan beban ini dengan pengeluaran perintah penahanan. Berdasarkan fakta kes semasa, mahkamah berpuas hati bahawa penahanan pemohon telah dibuat dengan menggunakan kuasa

undang-undang yang sah. Apa-apa yang menyalahi undang-undang atau di luar aturan dalam penahan yang awal itu tidak relevan dalam menentukan kesahan perintah yang dibuat oleh timbalan menteri (lihat perenggan 11); *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 diikut.

(3) Dalam afidavit itu, responden-responden dengan jelas menyatakan bahawa sesalinan perintah penahanan dan pengataan-pengataan fakta telahpun disampaikan ke atas pemohon. Kandungan dokumen-dokumen itu juga telah dijelaskan kepada pemohon. Afidavit itu juga menjelaskan prosedur yang diikuti. Mahkamah setelah menimbang perenggan dalam kedua-dua afidavit tidak boleh bersetuju dengan hujah menyebelahi pemohon atas alasan ketiga.

(4) Apa-apa luar aturan dalam tangkapan pertama, penjagaan dan penahanan pemohon oleh polis dalam perkara ini tidak relevan bagi tujuan menentukan kesahan perintah penahanan yang dikeluarkan oleh Timbalan Menteri pada 12 Julai 2004. Luar aturan sebegini tidak menjadikan perintah penahanan itu tidak sah atau tidak berkuat kuasa. Apa-apa luar aturan berhubung tangkapan awal pemohon oleh polis tidak diambil kira dengan pengeluaran perintah penahanan oleh Timbalan Menteri (lihat perenggan 15); *Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2004] 3 CLJ 375 tidak diikut.]

Notes

For cases on preventive detention, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1778–1793.

Cases referred to

Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1 (refd)
Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd [1998] 2 MLJ 167 (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81 (folld)
Mohamed Ezam bin Mohd Noor & Ors v Ketua Polis Negara & Ors [2002] 3 MLJ 34 (refd)
Munisvaran Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [2004] 3 CLJ 375 (not folld)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 1 MLJ 592 (refd)
Onkar Shrian; Re [1970] 1 MLJ 28 (refd)
Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)
Pe Long @ Jimmy & Ors, Re; Pe Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1976] 2 MLJ 133 (refd)
Public Prosecutor v Koh Yoke Koon [1988] 2 MLJ 301 (refd)
Tan Sri Khalid bin Raja Harun, Re [1988] 1 MLJ 182 (refd)
Theresa Lim Chin-Chin & Ors v Inspector General of Police [1988] 1 MLJ 293 (refd)

Legislation referred to

Arbitration Act 1952 ss 23, 24
Criminal Procedure Code ss 117, 366, Chapter xxxv 1
Emergency (Public Order & Prevention) Ordinance 1969 s 4(1), (4)
Federal Constitution art 5(2)
Rules of the High Court 1980 O 8 r 3, O 54, O 69 r 4

Alvinthiren (Alvinthiren & Partners) for the applicant.
Radhi bin Abas (Senior Federal Counsel) (Ministry of Internal Security) for the respondent.

Azahar Mohamed JC:

[1] The applicant, Krishnamoorthi a/l Kathurayan is the subject of a detention order made by the deputy minister of Internal Security dated 12 July 2004 pursuant to s 4(1) of the Emergency (Public Order & Prevention) Ordinance 1969 (the Ordinance). On 17 August 2004 he filed this application for a writ of *habeas corpus* (encl 3) for his release from detention in Pusat Pemulihan Akhlak, Simpang Renggam, Johor. The impugned detention order was in the following terms:

OD (KAMJ) JB
ORDINAN DARURAT
(KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) 1969
PERINTAH TAHANAN
(Seksyen 4(1)

Kepada:

Pegawai Yang Menjaga Pusat Pemulihan Akhlak, Simpang Renggam, Johor;
Ketua Polis Negara, Malaysia;
Semua Pegawai Polis Diraja Malaysia yang berkenaan.

BAHAWASANYA saya, berpuashati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan:

(a) ~~mencegah daripada melakukan perbuatan dengan apa apa cara yang memudaratkan ketenteraman awam~~ *
(b) menghapuskan kekerasan *
(c) mencegah jenayah melibatkan kekerasan *

Nama	No Kad Pengenalan
KRISHNAMOORTHI A/L KATHURAYAN	840520-10-6127

MAKA, OLEH YANG DEMIKIAN, pada menjalankan kuasa yang diberi dibawah Seksyen 4(1), Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut di atas ditahan selama dua (2) tahun mulai dari 12 haribulan Julai 2004 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor atau di mana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa.

Diperbuat pada 12 haribulan Julai 2004

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(DATO NOH BIN HJ OMAR)

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI MALAYSIA

(KAMJ 15332)

* Potong yang tidak berkenaan

[2] In support of the application, the applicant filed an affidavit, which was affirmed on 17 August 2004 enumerating numerous grounds for challenging the ministerial order of detention. At the hearing before me on 5 January 2005, four grounds were advanced on his behalf by his learned counsel. The first one relates to the complaint that he was not informed of the ground of his detention and the allegations of fact on which the detention order was based in contravention of s 4(4) of the Ordinance. The second is in connection with his first arrest on 9 April 2004. Learned counsel for the applicant pointed out that the police arrested him under the Ordinance on 14 May 2004. Thus, the applicant raised the issue of the legality of his detention between 9 April 2004 and 14 May 2004. The third is directed against the affidavit of ASP Sapii bin Ahmad in encl 4 filed by the respondents in opposing this *habeas corpus* application. It was argued that this affidavit was defective and inadmissible in evidence to answer the *habeas corpus* application, as the endorsement did not state the date of swearing of the affidavit. The fourth and the last point taken was that the first respondent failed to give full attention to the ground of detention and the allegations of fact and this is evident, it was argued, by the fact that the ground and the allegations were signed by the penolong setiausaha Keselamatan Dalam Negeri on 12 July 2004, the same date the first respondent signed the detention order.

[3] Before turning to consider the arguments raised by learned counsel for the applicant, I should perhaps at this stage deal with the preliminary objection raised by learned senior federal counsel for the respondents. It is this. It relates to the applicant's failure in not stating the grounds of the application on the notice of motion. Learned senior federal counsel argued that the applicant failed to comply with O 8 r 3 of the Rules of the High Court 1980 (the RHC) in not stating the grounds of the application in general terms on the notice of motion. Hence, it was argued that the application was defective and ought to be struck off. He cited the case of *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167 to support his argument. I need to say something about that case. It concerns a matter, which was commenced by way of an originating motion. The application was made under ss 23 and 24 of the Arbitration Act 1952 and was governed by O 69 r 4 of the RHC. However, it is important to bear in mind that the matter before me is a criminal application, which is governed by Chapter xxxvi of the Criminal Procedure Code (the CPC). On that

score, with respect to learned senior federal counsel, I derived no assistance from the various passages he cited from the judgment of that case, as the factual situation is different in the case before me. In this regard, it is pertinent to note that previously the procedure governing an application for *habeas corpus* was contained in O 54 of the RHC but that provision was repealed in 1993 by the Rules of the High Court (Amendment) 1993. To my mind, the relevant provision so far as is relevant to the determination of the matter is s 366 of the CPC, which provides:

> Every application to bring up before the court a person detained on a warrant of extradition or alleged to be illegally or improperly detained in custody shall be supported by affidavit stating where and by whom the person is detained and, so far as they are known, the facts relating to the detention, with the object of satisfying the court that there is probable ground for supposing that the person is detained against his will and without just cause.

[4] This section lays down the procedure involved in applying for a writ of *habeas corpus*. The application must be supported by an affidavit showing that the applicant is illegally or improperly detained in custody. The affidavit must also disclose the facts relating to such detention. It is to be noted that in instant case the applicant's criminal application, which was filed on 17 August 2004, is supported by his own affidavit, which was affirmed on 17 August 2004. In his supporting affidavit the applicant states that he is being illegally and improperly detained at Pusat Pemulihan Akhlak, Simpang Rengam, Johor. He also explained in some detail the relevant facts relating to the alleged illegal detention. In my view, the applicant has complied substantially with the requirements of s 366 of the CPC. Accordingly, the argument of senior federal counsel fails.

[5] I shall now deal with the specific issues raised by learned counsel for the applicant, which I have adverted to earlier. I think it will be convenient if I first deal with the second and third grounds together. It is important to note that these two grounds relate to the initial arrest and detention prior to the detention order made by the deputy minister on 17 August 2004. Learned senior federal counsel in responding to the contention of learned counsel for the applicant submitted that any irregularity or illegality in the initial arrest and detention is not relevant for the purpose of determining the legality of the detention made by the deputy minister under s 4(1) of the Ordinance. In support of his argument, learned senior federal counsel has referred me to the judgment of the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1CLJ 81. I shall discuss the significance of this case in the latter part of my judgment.

[6] Since preparing the draft of this judgment I have come across the decision of *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198. It is an important decision. It demonstrates the point that I want to make. In that case the police in connection with a robbery arrested

the applicant on 26 December 1974 and after being produced before the magistrate on 28 December 1974, he was detained under s 117 of the CPC until 3 January 1975. He was formally charged on 7 January 1975. While under detention his counsel requested to meet him. A date was fixed but the meeting was unsuccessful as the applicant was taken out of the police station on that day. This led to an application for a writ *habeas corpus* and it was alleged that: i) the right of the subject to consult and be defended by counsel of his choice commenced immediately after his arrest; ii) the right is an unqualified right and the denial of this right by the police had rendered the detention unlawful. When the application was filed the applicant had been detained by order of a magistrate. The application having been dismissed in the High Court, the applicant appealed to the Federal Court. The Federal Court dismissed the appeal and Suffian LP speaking for the court said at p 201:

> By the time this application was filed on 5 January 1975, Ooi had been detained by order of a magistrate, and so there was no question of his detention being unlawful.

[7] To my mind what His Lordship said in the passage above is a statement of principal of law of great importance and supports the proposition that a flaw in the initial arrest or detention does not vitiate a subsequent detention order made in the exercise of a valid legal power. In this regard, with respect I agree with the views of Arunandom J in *Re Pe Long @ Jimmy & Ors; Pe Long & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 where His Lordship said at p 135:

> Furthermore, in the case of *Ooi Ah Pua v OC Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 an applicant for a writ of *habeas corpus* had been arrested by the Kedah/Perlis Police and during his detention in police custody a solicitor wrote a letter asking to interview the applicant but was unsuccessful. Before the application for a writ of *habeas corpus* on that ground was filed in court the applicant had already been detained by order of a Magistrate. The application for a writ of *habeas corpus* was dismissed and the applicant appealed to the Federal Court, In dismissing the appeal Federal Court held that for ample reason the police arrested the applicant without a warrant but by the time the application for *habeas corpus* was filed the applicant had already been detained on an order of a Magistrate and therefore there was no question of his detention being unlawful because of the circumstances of arrest. In view of this judgment and my earlier findings on the question of arrest there is no merit in this ground and for purposes of this application cannot succeed. Hence at this stage any complaint about the arrest of the applicants would appear to be purely academic and of no relevance to an application for a writ of *habeas corpus* against the detention by the applicants by order of the Minister for Home Affairs.

[8] In that case, one of the grounds of complaint in the application for a writ of habeas corpus was that the initial arrest of the applicant was not in compliance with art 5(3) of the Federal Constitution. It was held that as the detainee had already been detained under s 4(1) of the Ordinance, any complaint about the initial arrest would be purely academic.

[9] In this respect I think it is important to keep in mind that art 5(2) of the Federal Constitution provides that where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that *the detention is lawful* (emphasis added), shall order him to be produced before the court and release him. In the case of *Re Onkar Shrian* [1970] 1 MLJ 28 Choor Singh J had this to say at p 30;

> The writ of *habeas corpus* is of English origin and to ascertain its scope we have to look at the English authorities. In Vol 11 of *Halsbury's Laws of England*, 3rd Ed, the writ is described and its scope set out very clearly at p 24. It is stated that the writ is a prerogative process of securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. By it the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of the subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released.

[10] In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, Gill FJ (as he then was) made the same point at p 153:

> Dato David Marshall on behalf of the appellant has raised three major grounds of appeal, the first of which turns on the question of burden of proof. In relation to this ground of appeal, it is to be observed that the learned trial judge dealt with the appellant's application for *habeas corpus* on the basis of the following passage in Basil's Commentary on the Constitution of India (5th Ed), Vol 2 at p 30:
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> > Where a person who has been deprived of his liberty challenges the detention by a petition for *habeas corpus*, it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detenu to show that the power has been exercised *mala fide* or improperly.
>
> Lord Macmillan said words to the same effect in the following passage from his speech in the House of Lords in the case of *Liversidge v Sir Johon Anderson*:
>
> > … I should add that, in my opinion, the production by the Secretary of State of an order of detention by him ex facie regular and duly authenticated, such as the House has before it in this case, constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid.

[11] Thus, in the context of the present case before me the onus of proving the legality of the detention order whereby the applicant was ordered to be detained for a period of two years at the Pusat Permulihan Akhlak, Simpang Renggam, Johor is on the deputy minister in the first instance. He has discharged it by the production of the detention order, which I have reproduced earlier. On the facts of the present case, I am satisfied that the detention of the applicant had been made in the exercise of a valid legal power. Any illegality or irregularity in the earlier detention is quite irrelevant in determining the legality of the order made by the deputy minister.

[12] Furthermore, it is also significant to bear in mind that the initial arrest and detention by the police and the detention order issued by the deputy minister are not wholly dependent on each other. Steve Shim CJ (Sabah & Sarawak) explained the principle in the Federal Court case of *Mohamed Ezam bin Mohd Noor & Ors v Ketua Polis Negara & Ors* [2002] 3 MLJ 34, After referring *Re Tan Sri Khalid bin Raja Harun* [1988] 1 MLJ 182 and *Theresa Lim Chin-Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293, His Lordship said at p 336:

> From the excerpts above, it seems clear that both *Re Tan Sri Raja Khalid* and *Theresa Lim* are decided principally on the basis that s 73(1), thereby giving rise to a situation where the court would be precluded from inquiring into the existence and/or sufficiency of the grounds under the section aforesaid. On that basis and reinforced by the provisions of Cl (3) of Article 151 of the Constitution, they hold that the subjective test should apply 'in determining the words 'reason to believe' in s 73(1). Everything, it seems, turns upon this inextricable connection between s 73(1) and s 8 thus, it becomes an issue for consideration.
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> By 'inextricably connected' I would take it to mean that s 73 and s 8 are wholly dependant on each other that there has to be a police investigation under s 73 before the minister can properly exercise his discretion to issue a detention order under s 8 or conversely, that no detention order under s 8 can properly be issued by the minister without the necessary investigation by the police under s 73. In my view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s 73. What matters of national interest are infinitely varies. So are matters of national security of the State, These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. They may will be other public consideration of a political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s 73 may stop short of submission of reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the minister. Does it then follow that the powers of the minister under s 8 have become impotent and stagnant?

[13] This brings me once more to the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* where one of the principal issue that arose in the Federal Court was whether the learned trial judge was wrong in holding that the legality or otherwise of s 8 detention hinges on the detention under s 73 of the Internal Security Act 1961 (the ISA). I think it is imperative that I repeat here in extenso with the necessary emphasis what His Lordship said on this issue at pp 99–100:

> The final proposition advanced by counsel for the appellants relates to the alleged misdirection by the learned judge in holding that the legality or illegality (as the

case may be) of a s 8 detention hinges on the detention under s 73 of the ISA. Here, counsel has submitted that any illegality or irregularity in the detention order under s 73 is quite irrelevant in determining the legality of an s 8 detention order. He contends that as the detention order under s 73 has been superseded by the order of the minister under s 8, the court should not have proceeded to hear the motion, which was based on the complaint against the police. According to him, a separate motion for writ of *habeas corpus* ought to have been made by the respondent, citing in support the observation of Steve Shim CJ (Sabah & Sarawak) in *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara (and 4 other appeals)* [2002] 4 CLJ 309 which reads:

> However, as the undisputed facts show that the appellants ... have now been detained by order of the minister under s 8 of the Act, the issue of whether or not to grant the writ of *habeas corpus* of their release from current detention does not concern us. That is a matter of different exercise.

Quite clearly, the submissions are aimed essentially at the concluding part of the judgment of the learned judge when he said as follows:

> With some not too careful officer having blemished the substantive procedural aspect of the detention exercise, it goes without saying that the eventual order issued by the minister, must similarly be tainted (*Nik Adli bin Nik Abdul Aziz v Ketua Polis Negara* [2002] 1 CLJ 161). If the roots are bad surely the fruits too will be bad. Some say that if the roots are bad, there will be no trees let alone fruits.

In countering the submissions, counsel for the respondent contends that the minister had in fact based his s 8 detention order solely on the basis of the report made by the police pursuant to s 73(3) and was correct in holding that the said s 8 detention order was tainted by the impropriety of the s 73 detention. According to him, since the report was the result of the s 73 detention which was bad, (indicating 'the root'), therefore the s 8 detention order must necessarily be bad (indicating 'the fruit'). (See paras 32.3 and 32.4 of this outline submission.)

I must confess I am unable to comprehend the rationale behind the learned judge's statement that 'if the roots are bad, surely the fruits to will be bad'. If it is meant to be an a axiomatic proposition for all purposes, then it cannot possibly be true because one can envisage many situations which do not necessarily fall into such a dogmatic characterisation especially where human conduct and behavior is concerned. Quite conceivably, as counsel for the respondent has submitted, the expression is meant to support the proposition that the illegality of the s 73 detention order had adversely affected the detention order issued by the minister under s 8 or conversely, that the s 8 detention order was tainted as a result of the illegality or irregularity of the s 73 detention order. If that be the case, then it would appear that the learned judge had failed to examine the factual circumstances in the context of the principles enunciated buy the Federal Court in Karam Singh. It is not disputed that there is affidavit evidence that the minister, on the basis of the report submitted to him, was satisfied that the activities of the respondent were a threat of the security of the country. Whether or not the allegations in the said report on which the s 8 detention order was based, were sufficient or relevant, was a matter to be decided solely by the minister. In this case, he was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open

to the court to examine the sufficiency or relevance of the allegations contained in the report. None of these considerations appear in the judgment of the learned judge.

[14] To my mind the principle underlying in the passage above is that any illegality or irregularity in the arrest or detention is irrelevant in determining the legality of a subsequent detention order made in the exercise of a valid legal power. It reminds us of what Suffian LP said on this issue, which I have alluded to in the early part of this judgment. Three points should now be made. The first is that prior to *Kerajaan Malaysia & Ors v Nasharuddin Nasir* the principle on this issue is enunciated by the Supreme Court in *Public Prosecutor v Koh Yoke Koon* [1988] 2 MLJ 301 where it was held that the continued detention which was authorised by the minister should not be allowed as a result of unlawful custody or detention by the police. The second is that, as was decided by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, since *Kerajaan Malaysia & Ors v Nasharuddin Nasir* is the later decision, it represents the present state of law and must prevail over *Public Prosecutor v Koh Yoke Koon*. The third and the last point is that although *Kerajaan Malaysia & Ors v Nasharuddin Nasir* concerns detention under the ISA the principle laid down by Steve Shim CJ (Sabah & Sarawak) in the passages that I have quoted above is of general application. To my mind what His Lordship said applies to all preventive detentions legislations.

[15] Returning to the present case, in my judgment any irregularity or illegality in the initial arrest, custody and detention of the applicant by the police in this matter is not relevant for the purpose of determining the legality or the lawfulness of the detention order issued by the deputy minister on 12 July 2004, which as I have said earlier had been made in the exercise of a valid legal power. Such irregularity or illegality does not render the detention order invalid or ineffective. Any irregularity of the initial arrest and detention of the applicant by the police had been taken over by subsequent event with the issuance of the detention order by the deputy minister. It follows therefore for the reasons above, it is with regret I find myself in disagreement with the views expressed by KP Gengadharan Nair JC (now judge) in *Munisvaran Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2004] 3 CLJ 375.

[16] I shall now deal with the first ground raised by learned counsel for the applicant. But I must first deal with the argument of learned senior federal counsel that the applicant should be precluded from taking up this ground because it was not raised in the affidavit filed by the applicant in support of the *habeas corpus* application. To my mind, the complete answer to this argument lies in the case of *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 1 MLJ 592 where Wan Yahya SCJ in delivering the judgment for the Supreme Court held that a party may raise a point of law at the trial itself even though it had not been specifically pleaded. I proceed to consider the merit of the first ground in this matter before me because I think it concerns a point of law as it will be recalled this ground relates to the complaint that

the applicant was not informed of the ground of his detention and the allegations of fact on which the detention order was based in contravention of s 4(4) of the Ordinance. As I understand him, the main thrust of his argument is this. There has been a failure to explain and translate correctly the detention order dated 12 July 2004 and the allegation of facts on which the detention was based. He placed heavy reliance on the affidavit of chief inspector Safuan bin Hj Md Nor in encl 7, para 4 and the affidavit of detective lance corporal Ramachandran in encl 5, para 3 to illustrate the contradiction of these two affidavits on the issue at hand. I think learned counsel's argument can only be understood if I refer to the various portions of the affidavits that I have mentioned a moment ago. This is what chief inspector Safuan bin Hj Md Nor said:

> 4 Pada 12 Julai 2004 jam 5.45pm saya telah menyampaikan salinan eks 'SM 1' dan 'SM 2' kepada pemohon. Isi-isi kandungan 'SM 1' dan 'SM 2' telah diterangkan didalam Bahasa Malaysia dan diterjemahkan kedalam Bahasa Tamil oleh Detektif Lans Kopral 112889 Ramachandran A/L Ponnan kepada pemohon.

[17] Detective lance corporal Ramachandran in his affidavit averred as follows:

> 3 Pada 12 Julai 2004 jam 5.45pm saya telah membantu Chief Inspector Safuan bin Hj Md Nor menyempurnakan kandungan Perintah Tahanan di bawah Sekysen 4(1) Ordinan Darurat (Kenteteraman Awam dan Mencegah Jenayah) 1969 (selepas ini dikenali sebagai 'Ordinan tersebut') terhadap Krishnamoorthi a/I Kathurayan (NO KP: 840520-10-61270 (selepas ini di kenali sebagai 'pemohon') Tugas saya disitu ialah menterjemahkan penerangan yang di buat oleh chief inspector Safuan bin Hj Md Nor dari Bahasa Malaysia ke bahasa Tamil kepada pemohon. Sebelum ini saya terlebih dahulu bertanya kepada pemohan bahasa yang fasih di gunakan oleh pemohon dan pemohon menyatakan yang dia fasih berbahasa Tamil. Saya kemudiannya menterjermahkan kepada pemohon penerangan yang dibuat oleh chief inspector Safuan bin Hj Md Nor dari Bahasa Malaysia ke Bahasa Tamil. Pemohon telah memahami segala terjemahan yang saya buat berkaitan dengan Perintah Tahanan tersebut dan saya juga telah menterjemahkan penerangan yang di buat oleh Chief Inspector Safuan bin Hj Md Nor kepada pemohon, tentang hak-hak pemohon untuk membuat representasi terhadap Perintah Tahanan itu kepada Lembaa Penasihat mengikut Sekysen 5(1) Ordinan tersebut dalam Bahasa Malaysia dan Chief Inspector Safuan Chief Inspector Safuan bin Hj Md Nor juga telah menyampaikan notis tentang hak-hak pemohon untuk membolehkan pemohon membuat representasi terhadap Perintah Tersebut.

[18] I have carefully considered the relevant passages of both the affidavits. However I failed to see how the passages support the contention of learned counsel. In his affidavit chief inspector Safuan bin Hj Md Nor clearly stated that he had served on the applicant a copy of the detention order and the allegations of fact. According to him he had explained to the applicant the contents of the documents. He also explained the role of detective lance corporal Ramachandran in translating the detention order and the allegations of facts to the applicant. The affidavit of detective lance corporal Ramachandran also

explained the procedure that was followed. In this regard exh 'SM 1' (this is exhibited in the applicant's affidavit in support of the application in encl 3) contains the following endorsement pertaining to the service of the detention order and the procedure of explaining and translating the contents of the documents to the applicant:

> Saya C/Insp SAFUAN BIN HJ MD NOOR (I/12502) yang bertandatangan di bawah memperakui bahawa saya pada hari ini 12 haribulan Julai 2004 jam 1745 Hrs pagi/petang/malam* telah menyampaikan kepada KRISHNAMOORTHI A/L KATHURAYAN No Kad Pengenalan 840520-10-6127
>
> (a) satu salinan Perintah Tahanan di bawah seksyen 4(1), Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969;
>
> (b) satu salinan penyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan-pengataan fakta yang atasnya perintah itu diasaskan;
>
> dan telah menerangkan kepada orang tahanan tersebut mengenai haknya untuk membuat represenlasi terhadap Perintah Tahanan itu.
>
> Tandatangan: tt
> Nama dan Pangkat: SAFUAN BIN HJ MD NOOR NOOR
> Jawatan: PPCKG IPD KLANG
>
> Isi kandungan butiran (a) dan (b) dan penerangan yang tersebut di atas telah diterangkan kepada orang tahanan sernasa penyampaian dilakukan dalarn bahasa / loghat * Tamil oleh:
>
> Tandalangan: tt
> Nama Jurubahasa.: RAMACHANDRAN A/L PONNAN
> No Kad Pengenalan/Kad Kuasa *: Rf 112889
>
> Saya KRISHNAMOORTHI A/L KATHURAYAN No Kad Pengenalan 840520-10-6127 mengaku telah menerima semua dokumen yang tersebut di butiran (a) dan (b) di atas pada 12 haribulan Julai 2004 dan telah faham isi kandungannya serta faham. mengenai hak saya untuk membuat representasi terhadap Perintah. Tahanan itu.
>
> Tandatangan: tt
> Nama: KRISHNAMOORTHI A/L KATHURAYAN
> No Kad Pengenalan: 840520-10-612
>
> * Potong yang tidak berkenaan.

[19] In the circumstances I am as well unable to agree with the arguments of learned counsel for the applicant on the third ground.

[20] The last ground that requires to be addressed is the point taken by learned counsel that the first respondent failed to give full attention to the grounds and the allegations of fact. I think it is useful I reproduce the relevant provisions of s 4 of the Ordinance which are as follows:

If the minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

[21] In this regard the deputy minister filed an affidavit dated 31 December 2004 (encl 11), which contained, *inter alia*, as follows:

> 5 Pada 11 Jun 2004 saya telah menerima laporan hal keadaan penangkapan dan penahanan terhadap pemohon daripada pegawai yang ditetapkan di bawah Seksyen 3(3)(C) Akta tersebut iaitu SAC 11 AYOB BIN MOHAMED;
>
> 6 Daripada laporan lengkap penyiasatan yang berkaitan dengan aktiviti pemohon yang telah saya terima mengenai tangkapan dan penahanan pemohon, saya telah berpuas hati bahawa pemohon adalah merupakan seorang ahli kumpulan bersenjatakan parang yang telah terlibat dalam kegiatan jenayah yang bercorakkan kekerasan di kawasan sekitar kawasan Klang pada tahun 2004 dan adalah perlu bagi supaya pemohon ditahan bagi menghapuskan kekerasan dan mencegah jenayah melibatkan kekerasan, Seterusnya saya telah membuat satu Perintah Tahanan di bawah Seksyen 4(1) Ordinan Darurat (Ketenteraman Dan Mencegah Jenayah), 1969 bertarikh 12 Julai 2004 (selepas ini dirujuk sebagai 'Perintah Tahanan tersebut') yang mengarahkan supaya pemohon ditahan bagi tempoh dua tahun di Pusat Pemulihan Akhlak Simpang Renggam (selepas ini dirujuk sebagai 'PPA Simpang Renggam') mulai dari 12 Julai 2004. Satu salinan Perintah Tahanan tersebut adalah seperti mana yang dilampirkan dan ditandakan sebagai eks 'KK-1' di dalam afidavit permohon;
>
> 7 Di atas arahan saya, pegawai saya bernama MOHD RUSSAINI BIN IDRUS telah menyediakan Alasan-alasan dan Pengataan-pengataan yang atasnya saya membuat Perintah Tahanan tersebut dan Pengataan-pengataan fakta yang di atasnya Perintah Tahanan tersebut diasaskan. Salinan Alasan-alasan dan Pengataan-pengataan fakta tersebut adalah seperti mana yang dilampirkan dan ditandakan sebagai 'KK-1' di dalam afidavit pemohon. Saya percaya bahawa Alasan-alasan dan Pengataan-pengataan fakta tersebut telah diterangkan dan diserahkan kepada pemohon pada tarikh yang sama Perintah Tahanan tersebut diserahkan kepada beliau. Saya sesungguhnya tidak dapat mengemukakan laporan-laporan penyiasatan terhadap pemohon kerana ianya bertentangan dengan kepentingan negara;
>
> 9 Merujuk kepada perenggan-perenggan 5, 13, 14, 15, 16, 17, 18 19 dan 20 (a) di dalam afidavit pemohon, saya sesungguhnya menafikan penyataan-penyataan di dalamnya dan menyatakan bahawa saya telah mengarahkan dan menumpukan perhatian saya sepenuhnya terhadap alasan-alasan untuk menahan pemohon di bawah seksyen 4(1) Ordinan tersebut dan saya juga telah menimbangkan dengan penuh teliti laporan lengkap bertulis penyiasatan yang dikemukakan oleh pihak Polis sebelum membuat perintah di bawah seksyen 4(1)

Ordinan tersebut. Saya sesungguhnya percaya bahawa laporan lengkap bertulis penyiasatan yang dikemukakan oleh pihak polis kepada saya telah dijalankan dengan teliti dan ianya mengandungi keterangan-keterangan saksi-saksi dan bukti yang menunjukkan pemohon terlibat di dalam aktiviti-aktiviti yang dipertuduhkan keatas beliau. Oleh yang demikian, saya sesungguhnya dengan suci hati percaya bahawa Perintah Tahanan yang dikeluarkan oleh saya terhadap pemohon adalah sah, tidak berniat jahat, tidak dibuat secara mekanikal, dibuat dengan betul di sisi undang-undang dan termasuk di dalam skop Ordinan tersebut. Saya juga sesungguhnya percaya bahawa alasan-alasan di atasnya Perintah Tahanan tersebut diasaskan adalah dalam lingkungan Ordinan tersebut dan Ordinan tersebut adalah terpakai dalam fakta-fakta tuduhan yang dibuat keatas pemohon;

10 Merujuk kepada perenggan 15 & 16 di dalam afidavit pemohon, saya juga ingin merujuk dan mengulangi pernyataan di dalam perenggan 9 di atas. Saya telah mengarahkan pegawai saya untuk menyediakan Alasan-alasan dan Pengataan-pengataan fakta yang telah dibuat terhadap Pemohon kerana saya mempunyai kuasa yang mutlak untuk mewakilkan kuasa saya terhadap pegawai-pegawai yang difikirkan perlu seperti yang diperuntukan di bawah Undang-undang bertulis;

[22] In substance the deputy minister in his affidavit said that having regards to the reports and the information relating to the conduct of the applicant and upon a proper evaluation of the facts and after due deliberation, he was satisfied that it was necessary for the suppression of violence and the prevention of crimes involving violence that the applicant should be detained for a period of two years. He has explained carefully the process and the procedure of preparing the grounds and the allegation of facts on which the detention order was based before he finally signed the detention order on 12 July 2004. It is clear to me that the decision by the deputy minister to issue the detention order was made upon a proper evaluation of all the facts and after due deliberation. I do not see any justification not to accept these averments of the deputy minister, In my view the detention order and the allegations of facts upon which the ground of detention was based was within the scope of s 4 of the Ordinance. It is an established law that a court does not interfere if the ministerial discretion is properly exercised. In the circumstances I also find no merit in the argument of learned counsel on the last ground.

[23] In the result, for all the reasons given, I find that the detention order made by the deputy minister is valid and it follows this application must be dismissed.

Application dismissed.

Reported by Peter Ling